IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMOS SANDERS, o/b/o D.S., Plaintiff, vs. MICHAEL J. ASTRUE, Commissioner of Social Security Administration, Defendant.	Case No. 07-1320-JTM

MEMORANDUM AND ORDER

This matter is before the Court on the defendant's Motion to Dismiss, which argues that the present Social Security appeal is untimely. The parties are not in dispute as to the underlying facts, and that October 10, 2007 was the date by which plaintiff Sanders was required to file his Complaint challenging the decision of the Commissioner. The Commissioner argues that the action is untimely, because the electronic docket sheet of the Clerk's Office shows the Complaint as being filed on October 18, 2007.

However, the Commissioner has not challenged the evidence submitted by plaintiff which demonstrates a legal assistant for plaintiff's counsel submitted the Complaint, along with a request for *in forma pauperis* status, on October 4, 2007. The following day, an Operations Support Specialist of the Clerk's Office responded by email stating that, as the plaintiff is a minor, the Complaint should use initials only, and that the IFP request should be in one document rather two separate documents.[1] The Support Specialist requested that the pleadings be revised and resent. However, the individual in plaintiff's counsel's office responsible for scanning of electronic documents was on vacation until October 15, 2007.

[1]The IFP request had been submitted as two separate documents because the signature page for the plaintiff's father was separately scanned.

Because both parties rely on evidentiary matters outside the pleadings, the Court will resolve the motion as one for summary judgment. Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the Court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a **genuine issue for trial**.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in *Matsushita*). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Commissioner correctly observes that 42 U.S.C. § 405(g) limits to 60 days the time in which a person may file a Complaint seeking review of an administrative decision, "or within such further time as the Commissioner may allow." Under 20 C.F.R. § 422.210(c), the statute has been

interpreted to require the filing of a Complaint within 60 days of the receipt of notice of the Commissioner's final decision. Under 20 C.F.R. § 404.901, it is presumed that notice will be received five days after it has been mailed. The Commissioner also correctly observed that courts may toll the 60-day time bar only in rare circumstances. *Bowen v. City of New York*, 476 U..S. 467, 480 (1986).

This is such a rare circumstance, and the Court will deny the Commissioner's motion. First, the Court finds that the present action was timely filed. Even if the initial Complaint submitted October 4, 2007 did not fully comply with all rules and requirements of the Court, this does not mean that the action was a nullity. The Complaint was in the constructive possession of the Clerk's Office, and thus will be considered as "filed" for purposes of the statute of limitations on October 4. *See Rodgers v. Bowen*, 720 F.2d 1550, 1551 (11th Cir. 1986). The Complaint was therefore timely.

Second, even if the Court were to deem the "filing" to have occurred on October 18, 2007, the Court would still deny the motion for dismissal on the grounds that the case reflects one of the rare cases where equitable tolling would be appropriate. Given the attempt by plaintiff to submit a Complaint with the limitations period, the relatively limited nature of the errors contained in the initial complaint, the very brief time before a new Complaint was resubmitted, and the absence of any prejudice to the Commissioner, the Court finds that equity clearly supports a brief suspension of the limitations period. *See Myer III v. Callahan*, 974 F.Supp. 578 (E.D. Pa. 1984).

IT IS ACCORDING ORDERED this 10th day of July, 2008, that the defendant's Motion to Dismiss (Dkt. No. 7) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE